UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MARGARET SMITH,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 92-197-B***
	)	
DONNA E. SHALALA,	)	
Secretary of Health	)	
and Human Services,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION [1]

This Social Security Disability appeal raises the question whether substantial evidence supports the Secretary's decision that despite an inability to perform a full range of light work because of her low back pain, the plaintiff retains the residual functional capacity to do other work. The plaintiff asserts that the Secretary failed to produce affirmative evidence that she has the residual functional capacity reflected in the decision and that the Secretary did not consider the testimony of the medical advisor or the evidence of chronic pain syndrome in the examining psychologist's report.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative

[1] This action is properly brought under 42 U.S.C. 405(g). The Secretary has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 12, which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on March 1, 1993 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since May 10, 1990 and meets disability requirements from that date through December 31, 1995, Findings 1-2, Record p. 20; that the medical evidence shows that she has ``severe back and leg pain associated with an impairment described as sclerosis in the right sacroiliac joint, a transitional S1 vertebra with sclerotic degenerative changes, and a chronic pain lifestyle," but that her impairments do not meet or equal any in Appendix 1, Subpart P, 20 C.F.R. 404 (the ``Listings"), Finding 3, Record pp. 20-21; that her assertions concerning her limitations are not credible, Finding 4, Record p. 21; that she has the residual functional capacity to perform the exertional and nonexertional requirements of work except for limitations on lifting, strenuous activities on a sustained basis and sitting for prolonged periods of time without an opportunity to walk or stand, Finding 5, Record p. 21; that she is unable to perform her past relevant work as a payroll clerk, Finding 6, Record p. 21; that her residual functional capacity to do a full range of light work is reduced by her inability to sit for prolonged periods, Finding 7, Record p. 21; that considering her exertional capacity for light work, her age (53 at date of onset), education (high school), and vocational background (semi-skilled), the Medical Vocational Guidelines to Appendix 2, Subpart P, 20 C.F.R. 404 (the ``Grid") direct a conclusion that she is not disabled, Findings 8-11, Record p. 21; that despite the nonexertional limitations that prevent her from performing a full range of light work, there are a significant number of jobs in the national economy that she could perform, Finding 12, Record pp. 21-22; and that, therefore, she was not disabled at any time through the date of the decision, Finding 13, Record p. 22. The Appeals Council declined to review the decision, Record pp. 5-6, making it the final determination of the Secretary. 20 C.F.R. 404.981; *Dupuis v. Secretary of Health & Human Servs.,* 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. 405(g); *Lizotte v. Secretary of Health & Human Servs.,* 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by

such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Because the Secretary determined that the plaintiff is not capable of performing her past relevant work, the burden of proof shifted to the Secretary at Step Five of the evaluative process to show the plaintiff's ability to do other work in the national economy. 20 C.F.R. 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence supporting the Secretary's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting her ability to perform other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

Since the larger question is whether the Secretary has met her burden of showing there is other work the plaintiff can perform, I will first address the plaintiff's contention concerning the Administrative Law Judge's consideration of specific evidence.

The plaintiff first argues that in arriving at his decision concerning her residual functional capacity to do other work, the Administrative Law Judge did not consider the testimony of medical advisor Dr. Robert Kellogg. As the plaintiff correctly points out, Dr. Kellogg described a very specific residual functional capacity:

> The medical evidence as outlined in the record would, I believe, . . . result in various functional limitations that include inability to stand or sit for periods of longer than 20 minutes without breaks, breaks of those approximate time intervals, or a change of position for walking. There are no environmental factors that I think come into play here. As far as walking is concerned there is basically no limitation. She can walk up to three or four miles. Now as far as lifting is concerned I would say for that frequently . . . let's say 10 pounds with occasional lifting of up to 20 pounds. There is no evidence to suggest any . . . functional impairment as far as pushing and pulling within those weight parameters.

Record p. 56. Dr. Kellogg described the plaintiff's pain as ``excessive of the objective evidence" based on the physical and neurological examinations, x-rays and CT scans but acknowledged that Dr. Gallon, the psychological examiner, thought the pain she experienced was ``real to her." *Id.* pp. 56-58. Although the Administrative Law Judge did not comment directly on Dr. Kellogg's testimony as to residual functional capacity in his decision, Dr. Kellogg's assessment clearly provided the basis for his hypothetical questions to the vocational expert. *See* Record pp. 59-63. The answers indicated that there were jobs in the national economy that the plaintiff could do, despite her limitations.[2] While he may not have commented directly upon Dr. Kellogg's report in his opinion, it is apparent that the Administrative Law Judge did consider it within the context of his examination of the vocational expert.

The plaintiff also contends that the Administrative Law Judge did not consider the psychological report of Dr. Gallon, the examining psychologist. To the contrary, the Administrative Law Judge stated in his opinion that Dr. Gallon's report had noted that the plaintiff appeared to have a ``chronic pain lifestyle" and that she ``appears to be emotionally labile" but observed that Dr. Gallon had ``alluded to no underlying medically determinable mental illness." *Id.* p. 16. Dr. Gallon noted that the plaintiff was ``quite vague about her symptoms" and that they ``are described in a dramatic fashion with widespread and generalized pain." *Id.* p. 224. In addition, he noted that she has ``a striking number of symptoms[,] some of them quite unusual such as `my body has been bone cold in the past year.'" *Id.* p. 225.[3]

This issue is more accurately characterized as a question of the weight to be given the various sources of evidence in the record. The plaintiff seems to think that the Administrative Law

[2] A hypothetical question posed by the plaintiff's representative to the vocational expert included as an additional factor the occasional impairment of concentration (attention to tasks) due to the influence of pain. *Id.* pp. 63-64. I can find nothing in the record, other than the plaintiff's own testimony, that suggests the presence of this condition.

[3] The plaintiff stated in her testimony that her hands become numb after working with them for 15 to 20 minutes. Record pp. 41-42. There is no evidence in the record that she has ever sought treatment for this condition.

Judge ignored or at least discounted Dr. Kellogg's testimony and Dr. Gallon's report in favor of medical opinions less supportive of a finding of disability, in particular those of examining physicians Turner and Bjorn. Dr. Turner, a neurosurgeon, had performed a neurological examination and, finding no evidence of nerve root compression, diagnosed a ``mechanical low back symptom complex" with no suggestion of a ``radicular problem." *Id.* p. 167. Dr. Bjorn, a general practitioner, noted that while the plaintiff was very inactive throughout the day because of her discomfort, she was ``paradoxically better" when she was square dancing. *Id.* p. 201. He described seeing the plaintiff in conference with Dr. Gallon, Dr. McCorkle (a chiropractor) and a physical therapist during which it was ``pointed out to her that her original injury has long since healed but she has gotten into a chronic pain spasm cycle with significant underlying pain protective behavior and her body tensions now complicate the ongoing pain problem." *Id.*

I note that the reports of the nontestifying, nonexamining physicians indicate that the plaintiff has the residual functional capacity to do light work. Dr. Hall commented that there was ``little demonstrative damage," that the CT scan was ``not very revealing" and that the plaintiff had no radicular signs. *Id.* p. 122. Dr. Johnson noted that the CT scan showed only mild degenerative joint disease and that ``multiple [physical examinations] have not revealed any [positive] objective findings." *Id.* p. 130.

The guidelines for weighing medical opinions appear in 20 C.F.R. 404.1527. The weight to be accorded an opinion depends on the examining relationship, treating relationship, the degree to which a medical source presents evidence to support an opinion (particularly medical signs and laboratory findings), consistency with the record as a whole, the medical source's specialization and other factors that would tend to support or contradict an opinion. 20 C.F.R. 404.1527(d). An administrative law judge may rely on a medical advisor's opinion in the face of contradictory findings. *See Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987); *Lizotte*, 654 F.2d at 130. However, this does not mean that a medical advisor's opinion must be

given controlling weight.

The weight given to medical opinions varies with the circumstances. *See Barrientos v. Secretary of Health & Human Servs.*, 820 F.2d 1, 2-3 (1st Cir. 1987) (opinion of treating physician entitled to no greater weight than that of consulting physician simply because of status); *Rodriguez Pagan*, 819 F.2d 1, 3 (1st Cir. 1987) (opinion of treating physician is not necessarily entitled to more weight than that of consulting physician; the administrative law judge may rely on a consultative physician's report when it conflicts with other medical evidence). The appropriate weight to be given to the testimony of the medical advisor, Dr. Kellogg, and to the report of the consulting psychologist, Dr. Gallon, was for the Administrative Law Judge to decide on the basis of the circumstances and the nature of the evidence in the record. I find no error in the Administrative Law Judge's consideration of these sources of evidence.

The larger question is whether substantial evidence in the record supports the Administrative Law Judge's decision. The Administrative Law Judge evaluated the plaintiff's testimony concerning her pain in light of Social Security Ruling 88-13 and *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19 (1st Cir. 1986), and found her testimony not credible. Social Security Ruling 88-13 stresses the importance of considering allegations of pain in assessing residual functional capacity:

> In evaluating a claimant's subjective complaints of pain, the adjudicator must give full consideration to all of the available evidence, medical and other, that reflects on the impairment and any attendant limitations of function.

Social Security Ruling 88-13, reprinted in *West's Social Security Reporting Service*, at 655 (1992). An administrative law judge is, as noted above, allowed to weigh and resolve conflicts in the medical evidence of record. Here, the Administrative Law Judge stated that none of the factors he had considered in arriving at his decision was individually conclusive, but that in combination they suggest that the plaintiff ``is not as limited as she contends." Record p. 20.

In support of her position, the plaintiff cites *Jacobs v. Heckler,* 595 F. Supp. 735 (D. Me. 1984), in which uncontradicted evidence of a claimant's psychophysiological pain was deemed sufficient to show that he was unable to perform past relevant work. However, *Jacobs* is distinguishable because in that case the psychological report was corroborated by that of the treating physician and the Administrative Law Judge found the plaintiff's testimony credible. Here, the treating physician, Dr. Bjorn, makes reference to a ``chronic pain spasm cycle" but notes the discrepancy between the plaintiff's reported inability to work and engage in daily activities and her statement that square dancing relieves her pain. Record p. 201. It may be true that an ability to engage in hobbies or some daily activities does not necessarily mean that a person is capable of working an eight hour day, but in the instant case the Administrative Law Judge found that the plaintiff's testimony was simply not credible in light of all the evidence of record.

Subjective symptoms must be evaluated with due consideration for credibility, motivation and medical evidence of impairment. *Gray v. Heckler,* 760 F.2d 369, 374 (1st Cir. 1985). A credibility determination by an administrative law judge who has observed the claimant, evaluated her demeanor and considered how the testimony fits with the evidence is entitled to deference, especially when supported by specific findings. *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, lusion regarding claimant's pain upheld in circumstances where claimant had made statements concerning pain to consulting examiners, but some were inconsistent with concomitant medical findings). The Administrative Law Judge concluded that the plaintiff's pain, although it may be ``real" to her, was not so significant that it prevented her from concentrating on work tasks on a sustained basis and that her own description of her activities suggested that she was capable of working. The Administrative Law Judge took into consideration the plaintiff's nonexertional limitations, including her need to move around and to avoid prolonged sitting or standing in one place, in his finding that she was able to perform a significant number of jobs in the national economy.

I find that the Secretary's conclusions are supported by substantial evidence in the record and, therefore, I recommend that her decision be ***AFFIRMED***.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 17th day of March, 1993.

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David M. Cohen
United States Magistrate Judge